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ABSTRACT

A newsletter provides legal background and guidelines for celebrating religious holidays in the classroom. Material is divided into separate sections discussing the First Amendment, Supreme Court decisions regarding public schools and religious observances, specific "establishment clause" cases, specific "free exercise clause" cases, the school prayer issue, compliance, methods for solving school-based religious controversies, tuition tax credits, and methods for dealing with court challenges. (LP)

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RELIGION AND THE PUBLIC SCHOOLS

Phyllis Schultz

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Religion and the Public Schools

Phyllis Schultz

It happens every year. As the Christmas season approaches, a special effervescence begins to pervade the classroom.

From window decorations and a Christmas theme for story time, holiday activities are extended to include festive decorations, gifts, pageants, and caroling.

And at some point amidst this mounting fervor, the calls from non-Christian parents start coming in. Their complaints vary. Some are outraged that their children are being evangelized in school. Others are distraught because their children feel left out and deprived. Still others claim that a basic American principle is being violated. Whatever the complaint, the bottom line is the same: "The public schools are no place for religious observances. Haven't you heard about the separation of church and state?"

Are we breaking the law when we hang a Christmas wreath on a classroom door? Precisely which activities are considered to be religious and therefore unconstitutional, and which are permissible?

The Supreme Court

Answers to many such questions have been handed down during the past few decades in a series of decisions by the U.S. Supreme Court. In making its decisions, the Court sets standards of constitutional observance that all states are expected to follow. While individual states are free to pass laws granting personal freedoms greater than those mandated by the Court, no state may curtail freedoms determined by the Court to be guaranteed under the Constitution.

Supreme Court rulings dealing with individual freedoms apply, however, only when the federal government or a state government is involved in the challenged activity. Such involvement is called "state action." The amount of state action required to turn a "private" institution into a "public" one is still a matter of scrutiny by the Court. (Receipt of federal funds is one well recognized way.) Generally speaking, however, if purely private schools practice any of the holiday observances mentioned above, the directors may respond to parents' complaints as their own judgment and that of the board of trustees dictate.

The *public* school principal, however, is expected to act in accordance with the holdings of the Supreme Court. Actions of public school principals and teachers, even when not expressly authorized by the school board or the state legislature, are considered actions of the state.

The First Amendment

All freedoms relating to religion, expression, and assembly are protected by the First Amendment to the Constitution. Religious freedom is guaranteed by the following language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The purpose of the "establishment" clause is to prevent the majority from imposing its religion on others by controlling the legislature. The "free exercise" clause provides that the government shall not restrict an individual's right to practice his or her religion. The combined effect of the two provisions is that the government may neither advance religion nor inhibit it.

Establishment clause cases: What advances religion?

Numerous cases focused on the question of what may properly be said to advance religion have been generated by activities in the public schools. In *Everson v.*

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Board of Education (of Ewing, N.J.), the Court in 1947 approved the use of public funds to bus children to Catholic schools. Didn't providing this transportation "advance religion"? Perhaps, said the Court, but only incidentally. In this particular field, it was held, the primary purpose was not to promote religion but to provide traffic safety. In short, a benefit to religion that occurs only as a part of a larger purpose is permissible.

In another case a year later, the Court dealt with a situation in a public school that had set aside a period during which students could either participate in a religious education program or go to the study hall. This arrangement was unconstitutional, the Court held, because it furthered religion by supplying buildings and pupils to sectarian groups for religious education. This decision was especially noteworthy because the Court's ruling established that aiding *all* religions was as violative of the Constitution as was aiding a particular religion.[1]

The school prayer case

The basic measurement in these and other similar cases is the practical effect—what the school authorities are trying to achieve and what the result is. A classic application of these propositions came in 1963 in the case of *Abington School District v. Schempp*. The controversy came after authorities mandated reading of the Bible and the Lord's Prayer in certain public schools in Pennsylvania and Baltimore City, Maryland. Children whose parents objected were excused from participating but the parents claimed that this arrangement caused their children to be labeled as "oddballs" and to have to retreat to a corridor and thus miss important announcements. The Court offered a test to determine if the legislated practices violated the First Amendment. The test asked:

> What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.

Academic study of religion and the Bible for the purposes of comparative religion, history, and literature is not prohibited.

This test is still the primary standard in all establishment clause cases. As an incidental note, the Court specifically provided that academic study of religion and the Bible for the purposes of comparative religion, history, and literature is *not* prohibited by the First Amendment. Here, as in numerous other cases, the Court held that the difference between acceptable and unconstitutional is the difference between teaching *about* religion as distinguished from the teaching *of* religion.

Compliance

Many people are shocked when told that reading the Bible and reciting the Lord's Prayer—or any prayer—in a public school is illegal. Some may point out that these practices are routine in the schools of a neighboring state and ask why there should be exceptions. The reason is that the Supreme Court has no enforcement powers; it only sets forth the legal standard to be applied when a practice is challenged in court. If Bible reading or prayer are not challenged in court, they may take place by default. However, if any students or parents challenge a practice that has specifically been forbidden by the Court, school authorities would be found to have violated federal laws. If the case came to trial, these authorities might be liable for damages resulting from depriving the plaintiffs of their constitutional rights, and the victorious plaintiffs might be entitled to collect legal fees from the defendant school system.

Following the *Schempp* decision, more than 100 Congressmen introduced amendments to the Constitution to circumvent the Court's decision. Their efforts have thus far failed, but as a day-to-day matter the presence or absence of prayer and Bible reading in the classroom has tended to reflect the prevailing sentiments of the particular school district. Where most residents of the community are in favor of, say, a time for prayer, other townspeople often have been unwilling to challenge this arrangement, for fear of reprisals or ostracism.

Nonetheless, challenges would seem to be on the rise. A survey conducted to determine the national impact of the *Schempp* ruling found that while 42 percent of schools conducted devotional Bible reading in 1960, only 14 percent did so in 1966.[2]

Meanwhile several state legislatures have sought various ways to circumvent the *Schempp* ruling. One called for voluntary attendance at a prayer session just prior to the beginning of the school day. The New Jersey Supreme Court held that this plan violated the First Amendment, and

the U.S. Supreme Court declined to hear an appeal. Many states have provided for a brief period of silent meditation. This idea has been challenged, but the Supreme Court has not as yet ruled on its constitutionality. Meanwhile, no one seems to have objected to a novel arrangement in some parts of Virginia by which children attend Bible classes sponsored by a local religious education group and held during school hours in a "Bible bus" parked in the school driveway. If a court challenge occurs, the outcome might well hinge on whether the driveway is school property.[3]

Free exercise clause cases: What inhibits religion?

While the establishment clause prohibits the states from engaging in certain acts for the purpose of supporting religion, the free exercise clause is aimed at preventing the states from restricting people's right to put their religion into practice. In enacting any law or regulation that tends to infringe on the individual's right to practice his or her religion, the state must have a "compelling" state interest. An example of a compelling state interest is mandatory immunization against communicable diseases despite whatever religious or other objections may arise.[4] When religious groups challenged mandatory participation in flag salute exercises in *West Virginia Board of Education v. Barnette* (1943), the Supreme Court held that the state's interest in fostering patriotism was not a compelling interest and could not override a free exercise clause challenge.

The free exercise clause has been used in challenging curricular matters ranging from evolution to sex education courses dealing with contraception and abortion. The contention by certain religious groups that such courses interfere with the exercise of their religion has not been successful in the courts. Generally state courts have upheld statutes requiring sex education courses, provided that students may be excused from any part of the course that conflicts with the parents' religious beliefs. The courts have further held that any stigma that the student suffers by not participating is justified by the state's interest in appropriately educating its students.

In enacting laws that tend to infringe on individuals' rights to practice their religion, the state must have a "compelling" state interest.

Solving problems on religion in the schools

The church-state issue is one of the most thorny and complex facing the schools today, and one of the most persistent. Certain practices (and challenges) tend to arise over and over again. Some of the most basic are reflected in ten occasionally asked questions. The answers to those questions indicate how some state and federal courts have dealt with these situations. It is important to remember that outcomes differ as the facts differ; and that judges do sometimes vary in their interpretations and applications of Supreme Court decisions. School officials should always consult legal counsel for guidance when a question of religion in the school arises.

Q. May a religious group rent public school buildings during non-school hours?

A. Such use may be forbidden by state statute. Where it is allowed, however, the state must give equal access to all religious groups seeking to use the facilities; no religious group may be selectively disqualified. Other requirements that courts have imposed include rental at full fair market value to religious and nonreligious groups alike. And a recent Supreme Court case has held that a public university that allows registered student groups to meet in university buildings cannot exclude student religious groups from this privilege.[5]

Q. May a school system lease church property for public school use?

A. Courts have approved such arrangements where the entire church building is fully staffed and controlled by public school authorities. The facilities must exclude religious furnishings and religious garb. Courts are reluctant to uphold leases of only part of a church building because of the entanglement that could result from the proximity of religious functions.

Q. May members of a religious order be public school teachers? May they wear their religious garb while teaching?

A. Members of religious orders may not be excluded from public school employment solely because of their religious affiliation. Some states prohibit by law the use of religious garb in school. Where there is no such prohibition, the court must determine if the impact of the religious garb justifies limiting the teacher's constitutional right to choice of dress. The use of small caps or religious insignia is rarely challenged in court.

Q. May students be dismissed from public school to attend religious school?

A. While such accommodation is not required by the Constitution, the Supreme Court has ruled in *Zorach v. Clauson* (1952) that it is permissible because the religious activity is not taking place on school property.

Q. Are Christmas assemblies permissible?

A. Courts reviewing religious commemorations in public schools have differed widely as to the constitutionality of such activities. School authorities are well advised to establish a written policy in advance in order to avert controversy. In a leading South Dakota case, *Florey v. Sioux Falls School District 49-5* (1979), the federal district court upheld one school board's policy that made the following distinctions:

1. Only holidays that have a religious *and* a secular basis may be observed in the public schools.
2. The origin of the holidays must be explained objectively, without sectarian indoctrination.
3. Holiday-related music, art, and drama are permitted in school activities if presented in a "prudent and objective" manner and as a traditional part of the cultural and religious heritage of the holiday.
4. Religious symbols may be displayed on a temporary basis as teaching aids to illustrate the holiday's cultural and religious heritage.

Q. Must a public school honor a student's objections, on religious grounds, to wearing a gym suit or participating in school activities he or she considers immoral, such as dancing?

A. In questions involving the right of individual students to exercise their religious beliefs, the courts have generally prohibited authorities from punishing any students who do not conform. In such cases, the courts must balance the individual's rights against the school's interest in enforcing a particular rule. When the school's interest is merely to promote regularity and discipline, as in the case with gym suits, the individual's rights tend to prevail; but when the health and safety of others are affected, the individual's rights may be restricted.

Invocations and benedictions are a traditional part of public ceremonies and do not create excessive entanglement between church and state.

In a recent Illinois case orthodox Jewish students challenged a high school association rule forbidding basketball players to wear skullcaps during games. As their religion required them to wear head coverings at all times, the students argued that the rule forced them to choose between playing basketball and observing their religion. The court held that the rule was a legitimate safety precaution that would be enforced until the students devised a safer way of attaching their head coverings than with bobby pins.[6]

Q. Are teachers entitled to be excused from work to observe their religious holidays?

A. While public schools may voluntarily accommodate religious interests of teachers without violating the establishment clause, the Supreme Court has not ruled that there is a constitutional duty to do so. A California state court has ruled that unexcused absences for religious observance were not punishable if substitute teachers were available.[7]

Q. What religious symbols may be displayed on school grounds?

A. The placement of crosses and nativity scenes on public property of any kind has caused litigation in many states, with conflicting outcomes. When the protest arose over displays of nativity scenes on national park grounds in the District of Columbia, a lower federal court ruled that the displays did not aid religion; however, that same decision ruled against government officials participating in a pageant.[8] Displaying plaques stating "In God We Trust" has been held to be constitutional by a New Hampshire court,[9] but posting the Ten Commandments in a classroom was rejected by the Supreme Court—even if the copies were purchased with private contributions.[10]

Q. Are invocations and benedictions permissible at public school ceremonies?

A. Lower courts disagree on this question. A Pennsylvania state court ruled, as have other state and federal courts, that there is no violation of the First Amendment in authorizing a clergyman to deliver an invocation and a benediction at a high school graduation exercise.[11] The court reasoned that the practice is a traditional part of public ceremonies and does not threaten entanglement between religion and the state. The U.S. Supreme Court refused to review this decision, and the question is thus open to regional rulings. It is worth noting, however, that when a graduation ceremony was held in a church, a federal court in Wisconsin found that the church-state involvement was too direct to survive constitutional challenge.

Q. May make-up sessions for school days missed due to bad weather or strikes be scheduled on a Saturday?

A. Most authorities say that a challenge to such a practice would probably succeed, unless attendance were on a voluntary basis. Any such case would doubtless lean heavily on *Wisconsin v. Yoder*, a landmark Supreme Court case decided in 1972. In this case the Court exempted Amish and Mennonite children from a state law requiring school attendance until age 16. The Court cited the sects' belief that attendance in high school endangered their deep religious conviction and the very existence of their sects. In any event, laws involving compulsory attendance at Saturday sessions would probably be struck down if challenged by members of a religious group that observed that day as the Sabbath, for the *Yoder* court established that a state's interest in education is not sufficient to force people to act in contravention of their religious conscience.

Tuition tax credits

A continually controversial question in this First Amendment debate has been in regard to tuition tax credits. There have been many different proposals to enact such tax credits, but the common thread running through all such plans is to provide tax relief to parents who send their children to private schools. Since many private institutions are religious-affiliated schools, opponents of tuition tax credits have argued that, among other things, such plans violate the Constitution's establishment clause because the plans generally advance the cause of religion.

In its platform, NAESP has joined the ranks of those who oppose tuition tax credits; a majority of the members of the Association believe that channeling public monies to private institutions ultimately will erode financial support for public education. While clearly recognizing the unique and valuable contributions that private institutions make toward the education of American schoolchildren, the Association is opposed to all proposals that would

NAESP is opposed to all proposals that would reduce financial support for the public schools.

reduce financial support for the public schools. The loss of a sound financial base would, the Association believes, imperil the chances for educational excellence in the public schools—and ultimately would work to the detriment of the welfare of the nation.

The Supreme Court, in a June 1983 decision, has ruled otherwise. In *Mueller v. Allen*[12] the Court upheld a Minnesota law that permits state income tax deductions by parents for the costs of "tuition, textbooks, and transportation" for children attending elementary or secondary school, whether public or private, sectarian or nonsectarian.

Because the legislation upheld in *Mueller v. Allen* is broadly based, applying to all elementary and secondary students in the state whether they attend public, private, or parochial schools, a 5- to 4-majority on the Court reasoned that the Minnesota law is neutral in regard to religion. In other words, it passed the Constitution's "three-part" test because it is fundamentally secular in purpose, does not have the primary effect of advancing or inhibiting religion, and does not foster excessive entanglement between church and state.

Responses to the Court's decision have run the gamut from general enthusiasm to genuine concern about the impact of the ruling on public education.

Advocates hailed the decision as one that recognizes the special place that private education occupies in our educational system. Supporters also say that the ruling will foster healthy competition between public and private schools, perhaps spurring public schools on to renewed purpose.

Others argue that while the purpose of Minnesota's law may be secular, the effect of the legislation will be a direct benefit to religious schools. According to a June 30, 1983, editorial in *The Washington Post* ("The Court, Education and Religion"), "95 percent of Minnesota's private schoolchildren are in sectarian schools, and deductible costs at free public schools are negligible." Thus, the *Post* goes on to say, the effect of the law is to "direct . . . tax dollars overwhelmingly toward religious institutions."

This ruling may have implications for other tuition tax proposals, notably those of the Reagan administration. For example, *Newsweek* magazine (July 11, 1983), in an interpretation of this decision, asserts that "the White House will have to abandon its scheme for tax credits for private schools only."

On the other hand, Burt Neuborne, legal director of the American Civil Liberties Union, has expressed concern that "people are going to read this as a green

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light"—a go-ahead for other proposals with even greater potential support for parochial education.

Still others say that it is doubtful whether federal laws that extend tax credits to public *and* private schooling will be enacted, because of the very real burden such plans will place on the nation's treasury. And finally, some private school educators say that an influx of federal money will hurt private schools rather than help them, because they will lose their much valued independence.

The issue bears watching, then, both for the way other laws are proposed and enacted and for the effects such profound changes in the tax structure will have on the already economically pinched public schools.

Dealing with court challenges

New church-state controversies will doubtless confront the schools in the months ahead, and old ones will resurface. In the face of the challenges that seem destined to come, public school principals would do well to evaluate all challenged practices in terms of the same test of constitutionality used in *Mueller v. Allen* and other related decisions:

- Does the activity have a separate secular purpose?
- Does the activity's primary effect neither advance nor inhibit religion?
- Does the activity avoid excessive entanglement between church and state?
- If it is claimed that the free exercise of religion is inhibited, is there a compelling state interest involved—health, for example, or safety—that outweighs the rights of the individual?

But even before these questions arise, principals and school administrators would do well to have worked out in advance detailed policies on how to handle just such problems—and to have done so through committees that are truly representative of the community. Then, when questions come up, examine the challenges in light of the basic principles involved, reach for the telephone, and talk with a lawyer.

Notes

1. *McCollum v. Board of Education*, U.S. Supreme Court (1948).
2. David L. Kirp and Mark G. Yudof, *Educational Policy and the Law*, Berkeley, Cal. McCutchan Publishing Corp., 1982, p. 137.
3. *The Washington Post*, December 13, 1982.
4. *Jacobson v. Massachusetts*, U.S. Supreme Court (1905).
5. *Widmar v. Vincent*, U.S. Supreme Court (1982).
6. *Menorah v. Illinois High School Association* (1982), 638 F.2d 1030, cert. den. 51 U.S. 3533 (1983).
7. *Rankins v. Commission on Professional Competence*, 593 P.2d 852 (Cal. 1979).
8. *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973).
9. *Opinion of the Justices*, 228 A.3d 161 (N.H. 1967).
10. *Stone v. Graham*, U.S. Supreme Court (1980).
11. *Wiest v. Mt. Lebanon School District*, 320 A.2d 362 (Pa. 1974), cert. den. 419 U.S. 967 (1974).
12. *Mueller et al. v. Allen et al.*, U.S. Supreme Court (1983).

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